No. 80-709

JAN 5 1981

In the Supreme Court of the United States

OCTOBER TERM, 1980

MINWER A. BADWAN AND RAWHI A. BADWAN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

M. CARR FERGUSON
Assistant Attorney General

ROBERT E. LINDSAY
TERRY L. FREDERICKS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-709

MINWER A. BADWAN AND RAWHI A. BADWAN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTION PRESENTED

Whether the district court abused its discretion in denying petitioners' motions for a continuance of their trial.

TABLE OF AUTHORITIES

Page

Cases:

Avery v. *State of Alabama*, 308 U.S. 444 ..... 6, 7

Ungar v. *Sarafite*, 376 U.S. 575 ..... 4, 5, 6, 7

United States v. *Burton*, 584 F. 2d 485, cert. denied, 439 U.S. 1069 5

United States v. *Collom*, 614 F. 2d 624, cert. denied, 446 U.S. 923 4

United States v. *Davis*, 604 F. 2d 474 ..... 4, 5, 6

United States v. *Henderson*, 588 F. 2d 157, cert. denied, 440 U.S. 975 6

United States v. *Johnson*, 319 U.S. 503 6

United States v. *Leavitt*, 608 F. 2d 1290 ..... 4, 5

United States v. *Medina-Arellano*, 569 F. 2d 349 7

United States v. *Riebold*, 557 F. 2d 697, cert. denied, 434 U.S. 860 7

United States v. *Roselli*, 432 F. 2d 879, cert. denied, 401 U.S. 924 6

United States v. *Rothman*, 567 F. 2d 744 5

United States v. *Schwanke*, 598 F. 2d 575 7

United States v. *Smith*, 591 F. 2d 1105 7

United States v. *Tissi*, 601 F. 2d 372 ..... 4, 5

United States v. *Uptain*, 531 F. 2d 1281 6

United States v. *Warden*, 545 F. 2d 32 6

United States v. *Wilson*, 601 F. 2d 95 6

PREVIOUS PAGE WAS BLANK

Page

Statutes:

Internal Revenue Code of 1954, 26 U.S.C. 7206(1) 1, 6

Speedy Trial Act Amendments of 1979, Pub. L. No. 96-43, Section 2, 93 Stat. 327 8

18 U.S.C. 3161(c) 8

Miscellaneous:

3 C. Wright, *Federal Practice and Procedure*, Criminal (1969 & Supp. 1979) 4

OPINION BELOW

The opinion of the court of appeals (Pet. App. 12a-35a) is reported at 624 F. 2d 1228.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 1980. A petition for rehearing was denied on August 29, 1980 (Pet. App. 36a-37a). The petition for a writ of certiorari was filed on October 27, 1980. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

On March 5, 1979, a grand jury returned an indictment against petitioner Minwer A. Badwan charging him with five counts of violating Section 7206(1) of the Internal Revenue Code of 1954 (26 U.S.C.) by filing false income tax returns (Pet. App. 38a-42a). On the same day, the grand jury also returned a four-count indictment against petitioner Rawhi A. Badwan for violating the same statute (Pet. App. 43a-47a). Following a jury trial, petitioners were convicted as charged. Both were sentenced to three-year terms on the first count, with all but six months thereof suspended in favor of three years' probation. On each of the remaining counts, petitioners received suspended sentences of three years' imprisonment and three years' probation to run concurrently with the probation terms imposed under the first count (A. 223-226).[1] The court of appeals affirmed (Pet. App. 12a-35a).

---

[1] "A." refers to the appendix filed in the court of appeals.

Four days after their indictment, on March 9, 1979, petitioners retained counsel (Pet. App. 49a). They were arraigned on March 12. At that time, the district court ordered that pretrial motions be filed within 10 days and heard on March 23. Counsel for petitioners offered no objection to these dates. Trial was set for April 3 after the court and counsel had agreed that that was a mutually satisfactory date (Tr. 1-7).[2]

---

[2]"Tr." refers to the transcript of the arraignment proceedings.

The following colloquy took place during the arraignment proceedings (Tr. 5):

THE COURT:
I'll consolidate the cases for trial and set it for trial with a jury March 28th.

[Defense counsel]:
Your Honor, I have a jury trial in Fairfax on the 28th of March.

THE COURT:
The 21st?

[Defense counsel]:
I have depositions that afternoon in a rather important case. Any time the week of April 2nd, except for Monday, would be available.

THE COURT:
April 3rd?

[Defense counsel]:
Very well.

THE COURT:
Set for trial with a jury on April 3rd. I'll direct that any motions that ought to be filed in the case be filed within ten days. I'll set those motions for March 23rd.

[Defense counsel]:
Very well, Your Honor.

Two days later, on March 14, the prosecutor met with petitioners' counsel. Petitioners' counsel was permitted to review the government's files, which contained the original or a copy of every trial exhibit. At that time, counsel chose only to review these documents "briefly." Counsel was also given a copy of every written statement made by petitioners. On March 16, counsel was invited to meet with the special agent in charge of the investigation of the case. That meeting was later rescheduled for March 20 (Pet. App. 50a). By letter dated March 20, defense counsel also was notified that he would be permitted to copy various government exhibits (A. 22-23). On that same date, petitioners first sought a continuance. They requested that the March 21 deadline for filing motions be extended until April 2 and that the trial be delayed until late April or early May (Pet. App. 48a-52a). This motion was denied on the same day (A. 21).

On March 24, petitioners, their counsel and an accountant[3] spent two and one-half hours reviewing the government's files. During the remaining ten days before trial, however, it appears that no further attempts were made to examine these records (Pet. App. 64a-66a).

On the morning of the trial, petitioners filed a second motion for a continuance, in which they requested an additional two weeks to file pretrial motions and an additional six weeks to prepare for trial (Pet. App. 54a-63a). The district court denied the motion and proceeded with the trial (Pet. App. 3a).

---

[3]Petitioners' counsel first contacted the accountant on March 19 (Pet. App. 64a).

ARGUMENT

Petitioners seek review of their convictions on the ground that they were denied due process of law by the district court's refusal to grant them a continuance.

1. Contrary to petitioners' suggestion (Pet. 20-22), the law in this area is well settled. This Court established the applicable standards to be applied by trial and appellate courts in *Ungar* v. *Sarafite*, 376 U.S. 575, 589-590 (1964):

> The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. *Avery* v. *Alabama*, 308 U.S. 444. Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. *Chandler* v. *Fretag*, 348 U.S. 3. There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. *Nilva* v. *United States*, 352 U.S. 385; *Torres* v. *United States*, 270 F. 2d 252 (C.A. 9th Cir.); cf. *United States* v. *Arlen*, 252 F. 2d 491 (C.A. 2d Cir.).

Accord, e.g., United States v. *Collom*, 614 F. 2d 624, 634 (9th Cir.), cert. denied, 446 U.S. 923 (1980) *United States* v. *Leavitt*, 608 F. 2d 1290, 1293-1294 (9th Cir. 1979); *United States* v. *Davis*, 604 F. 2d 474, 480-481 (7th Cir. 1979); *United States* v. *Tissi*, 601 F. 2d 372, 374 (8th Cir. 1979); 3 C. Wright, *Federal Practice and Procedure, Criminal* ffl 832 (1969 & Supp. 1979) (and cases cited therein).

As the foregoing authorities make clear, in determining whether to grant or deny a motion for a continuance, the trial judge must look to the facts of the particular case. While, as petitioners point out (Pet. 14-16, 20-22), factors that are considered determinative by one court are often not even mentioned by another,[4] this is not the result of any inconsistency. Rather, it is the result of the fact that "each decision necessarily turns on the particular facts and circumstances of the case." *United States* v. *Davis, supra*, 604 F. 2d at 480; see *Ungar* v. *Sarafite, supra*, 376 U.S. at 589; *United States* v. *Leavitt, supra*, 608 F. 2d at 1293-1294; *United States* v. *Tissi, supra*, 601 F. 2d at 374; *United States* v. *Burton*, 584 F. 2d 485, 490-492 (D.C. Cir. 1978), cert. denied, 439 U.S. 1069 (1979); *United States* v. *Rothman*, 567 F. 2d 744, 747-749 (7th Cir. 1977). An inflexible standard, as urged by petitioners, would therefore be inappropriate.

2. Before this Court, *amici* assert (Br. 2-3, 14) that the present case is but one example of the practice followed in the Eastern District of Virginia of routinely denying meritorious motions for continuances. If, in fact, such a problem exists in that district, it is plainly a matter to be dealt with in the first instance by the court of appeals rather than this Court. *Amici*, however, did not file in the court of appeals, and the asserted problem was not otherwise brought to that court's attention. There is no need for this Court to pass upon the validity of a particular district court's practice until the court of appeals for the circuit in which the district is located has had an opportunity to do so.

---

[4]For a summary of the various factors courts have considered, see *United States* v. *Burton*, 584 F. 2d 485, 490-491 (D.C. Cir. 1978), cert. denied, 439 U.S. 1069 (1979).

3. In any event, as the court of appeals found (Pet. App. 1a-24a), the district court's denial of petitioners' motions for a continuance does not require reversal of their convictions.

An appellate court reviewing the denial of a continuance may reverse the trial court only if there is a clear abuse of discretion. See, *e.g.*, *Ungar* v. *Sarafite, supra*, 376 U.S. at 589; *United States* v. *Henderson*, 588 F. 2d 157, 159 (5th Cir.), cert. denied, 440 U.S. 975 (1979); *United States* v. *Uptain*, 531 F. 2d 1281, 1285 (5th Cir. 1976). Indeed, this Court has stated that the trial court's decision ordinarily is not even subject to review. *Avery* v. *State of Alabama*, 308 U.S. 444, 446 (1940); accord, *United States* v. *Davis, supra*, 604 F. 2d at 480.

Here, petitioners have not alleged any specific facts demonstrating that they actually were prejudiced by the district court's denial of their motions for a continuance.[5] Rather, petitioners appear to contend that, given more time, they might have been able to uncover evidence to refute the government's case.[6] This failure to specify prejudice is in

---

[5]In their petition for rehearing filed in the court of appeals (at 8), petitioners did point to some specific items that they contended were erroneously included in the government's calculations of their income. Those items, however, constituted only a small percentage of the total amount of unreported income with which petitioners were charged. Moreover, a conviction under 26 U.S.C. 7206(1) does not require proof of any exact amount of unreported income. See *United States* v. *Johnson*, 319 U.S. 503, 517-518 (1943); *United States* v. *Wilson*, 601 F. 2d 95, 99 (3d Cir. 1979); *United States* v. *Warden*, 545 F. 2d 32, 36 (7th Cir. 1976); *United States* v. *Roselli*, 432 F. 2d 879, 897 (9th Cir. 1970), cert. denied, 401 U.S. 924 (1971). Thus, even if all of these allegations were accepted as true, the main outlines of the government's case against petitioners would remain intact.

[6]The petition for a writ of certiorari was filed more than one year and seven months after petitioners were indicted. Their petition for rehearing in the court of appeals was filed more than one year and three months after they were indicted. Surely, petitioners have had adequate time to find some evidence that they were materially prejudiced, if that is in fact the case, particularly when their failure to do so was pointed out to them by the Fourth Circuit (Pet. App. 21a-22a).

itself fatal to their claim. See, *e.g.*, *Avery* v. *State of Alabama*, *supra*, 308 U.S. at 452-453; *United States* v. *Schwanke*, 598 F. 2d 575, 579-580 (10th Cir. 1979); *United States* v. *Smith*, 591 F. 2d 1105, 1110 (5th Cir. 1979); *United States* v. *Medina-Arellano*, 569 F. 2d 349, 353-354 n.3 (5th Cir. 1978); *United States* v. *Riebold*, 557 F. 2d 697, 702 (10th Cir. 1977), cert. denied, 434 U.S. 860 (1977).[7]

Evidence that the district court did not abuse its discretion is also found in the transcript of the arraignment proceedings. At that time, petitioners' counsel was sufficiently familiar with their case to assure the district court that he could foresee no potential conflict of interest in his representing both petitioners (Tr. 4). Petitioners' counsel himself suggested that the trial be held during the week of April 2 (see note 2, *supra*). At that point, counsel at least was aware of the nature of the charges against petitioners and must be assumed to have understood the problems inherent in a criminal tax fraud case, including the fact that an experienced accountant is often necessary in such cases. Nonetheless, petitioners' counsel not only failed to contact an accounting firm until a full week after he himself was retained, but also failed to make full use of the time prior to trial to review the government's evidence. Thus, it is plain that if petitioners' counsel actually did not know about some of the government's exhibits prior to trial, any surprise by their production at trial was due to his own failure

---

[7]Petitioners and *amici* argue (Pet. 18; Brief of *amici* 8) that the government has failed to prove that the grant of a continuance would have prejudiced its case or the court. The burden of proof, however, is on petitioners. See *Ungar* v. *Sarafite*, *supra*, 376 U.S. at 591.

to utilize adequately the time he had. That failure is particularly perplexing in light of counsel's knowledge that the district court did not routinely grant continuances (Pet. App. 16a).

Moreover, petitioners' allegations that this was a highly complex case are questionable at best. Of the nine tax returns involved in this case, six were petitioners' individual tax returns, which were relevant only as to the amount of partnership income actually reported. The dispute centered around the three partnership returns on which the government demonstrated that petitioners had failed to report substantial amounts of income. Additionally, much of the evidence used by the government was from petitioners' own records (A. 208-212).

4. Finally, any decision by the Court in this case is unlikely to have any prospective precedential value. Effective August 2, 1979, 18 U.S.C. 3161(c) was amended by the Speedy Trial Act Amendments of 1979, Pub. L. No. 96-43, Section 2, 93 Stat. 327 to provide:

> (2) Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

Thus, the specific legal issue presented in this case (of a defendant's being tried, over his objection, within 22 days of his arraignment) has largely been rendered moot.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

M. CARR FERGUSON
Assistant Attorney General

ROBERT E. LINDSAY
TERRY L. FREDRICKS
Attorneys

JANUARY 1981

---

[8]Enactment of a statute requiring at least 30 days between arraignment and trial does not mean that trials conducted before the effective date of the statute were deficient if they began within thirty days after arraignment. The 22-day period between arraignment and trial in this case was not drastically shorter than that provided for by the Speedy Trial Act Amendments. In any event, petitioners did not ask for merely eight days more than the 22 they were given, but for several weeks. Thus, even if the statute had applied, it would not have entitled petitioners to the continuance they contend was necessary.

DOJ-1981-01